

NO. 22658

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAMES R. THOMAS,

Appellant,

MAR 28 1969

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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I

STATEMENT OF JURISDICTION

On June 10, 1964, defendant was indicted in two counts by the Federal Grand Jury for the Southern District of California for two armed robberies of National Banks netting over \$9,000 by the use of .45 automatics in violation of Title 18, United States Code, §2113(a) and (d) [C. T. 2]. <sup>1/</sup> On June 26, 1964, Thomas filed a Petition to Enter Plea of Guilty [C. T. 6], and on that date entered a plea of guilty to Count One of the Indictment [C. T. 10]. On

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1/ "C. T. " refers to Clerk's Transcript.



August 4, 1964, the Honorable Albert Lee Stephens, Jr., United States District Judge, sentenced Thomas to the custody of the Attorney General for the maximum period provided by law and for a study as described in Title 18, United States Code, §4208(c) [C. T. 11].

On June 12, 1967, Thomas filed a Motion to Vacate and Set Aside Judgment and Plea of Guilty [C. T. 19] after Judge Stephens said on June 5, 1967 that the report from the Bureau of Prisons recommended a twenty-five year sentence pursuant to §4208(a)(2) of Title 18, United States Code [R. T. of June 5, 1967].<sup>2/</sup>

On August 7, 28, 29 and 30, 1967, hearings were held on the motion to withdraw the plea, and on August 30, 1967, Judge Stephens denied the motion [R. T. 375-385].

On September 21, 1967, Thomas was committed to the custody of the Attorney General for twenty-five years pursuant to Title 18, United States Code, §4208(a)(2) [C. T. 57].

On October 2, 1967, eleven days after the Judgment was entered, defendant filed a Notice of Appeal [C. T. 59].

On June 4, 1968, Judges Merrill and Koelsch dismissed the appeal for want of prosecution. On June 28, 1968, Judges Merrill and Koelsch reinstated the appeal.

The District Court had jurisdiction under the provisions of

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<sup>2/</sup> "R. T. " refers to Reporter's Transcript and in this case to part of the Transcript which will be supplemented.



Title 18, United States Code, §§2113(a) and (d), and 3231, and Rule 32(d) of the Federal Rules of Criminal Procedure.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, §§1291 and 1294.

## II

### STATEMENT OF FACTS

On June 10, 1964, defendant Thomas was indicted for two armed bank robberies [C. T. 2]. On June 26, 1964, defendant appeared with retained counsel William J. Bluestein and entered a plea of guilty to Count 1 and not guilty to Count 2 [C. T. 10]. At that time defendant filed a Petition to Enter Plea of Guilty [C. T. 6], and in response to questions from Judge Albert Lee Stephens, Jr. , replied he had read the petition to enter a plea and understood it; he understood the maximum penalty; he had not been promised any leniency or special kind of sentence; he had not been approached with promises to plead guilty; he had received no threats; he had told his attorney all facts surrounding the indictment; his tendered plea was a free and voluntary act; and he had no questions about the contents of the plea form [R. T. Supp. of 6/26/64, pp. 17-18; R. T. 188189].

On August 4, 1964, Judge Stephens imposed a maximum sentence and committed Thomas for a study as authorized by Title 18, United States Code, §§4208(b) and (c) [R. T. Supp. 24-25; C. T. 11].



Practically three years later, on April 11, 1967, Thomas was returned to the Court and the matter was continued to April 19 [R. T. Supp. pp. 28-29].

On April 21, 1967, defendant appeared with William Bluestein and the representation was made that Thomas wanted a delay to prepare some unspecified motions [R. T. Supp. 32].

On May 15, 1967, Thomas appeared with appointed counsel Bernard G. Winsberg, dismissed his counsel, was aware of the pre-sentence report, and stated that he had affidavits to prove his plea was "onerous" [R. T. Supp. pp. 37-39].

On June 5, 1967, Thomas appeared in pro per and was specifically informed of what sentence the Judge had in mind, twenty-five years pursuant to Title 18, United States Code, §4208(a)(2) [R. T. Supp. p. 50]. At that time Thomas informed Judge Stephens that his wife had obtained affidavits "from a lawyer and from other officials" [R. T. Supp. pp. 51-52], and he "refuse[d] to accept sentence . . . "[R. T. Supp. p. 53].

On June 12, 1967, Thomas filed a Motion to Vacate and Set Aside Judgment and Plea of Guilty [C. T. 19]. In said Motion, Thomas alleged, under oath, that while under the influence of narcotic drugs in the County Hospital, the FBI told him he could avoid prosecution by the State for kidnapping by pleading guilty to a bank robbery and convincing the FBI of his guilt. There is further alleged that Bluestein told him that the FBI and state officials said the local charges would be dismissed if Thomas was convicted of bank robbery in the Federal Court. Thomas further







alleged the FBI returned to reiterate the "deal". Thomas alleged that both the "Federal Agents" returned and said that only the State judge could dismiss the charges and it would be done. The conclusion is alleged that without the promises of the FBI he would not have plead to the Federal charge.

From August 28 to 30, 1967, Judge Stephens held an evidentiary hearing relative to the allegations made by Thomas, as embellished on August 7, 1967. Said embellishments were that he was under the influence of narcotics at the times of interrogation and plea, Bluestein was incompetent, and he was never advised of his rights.

Dr. Tennison S. Dong, M. D., testified that he specializes in general surgery and at the time of testifying was employed by the Los Angeles Sheriff's office, assigned to the Narcotics Division [R. T. 271]. After Thomas left the hospital for his gunshot wounds May 31, 1964 [R. T. 277], he was not addicted to drugs [R. T. 282], and received no narcotics [R. T. 282]. After Thomas left the hospital he was normal in his mental state [R. T. 284]. Any medicine he took after May 31 would have no effect "on the state of mind, his consciousness or thinking process" [R. T. 284]. No medication was received on the date of plea (June 26, 1964) [R. T. 294-95], and there was no effect on Thomas' mind from medicine or drugs on that date [R. T. 297].

The claim of Bluestein's incompetence was withdrawn [R. T. 91-92].

With respect to the advising of rights by interviewing



agents of the FBI, it is noted that each agent who testified related that Thomas was advised of his rights by the witness or his accompanying Special Agent, and the Court so found [R. T. 21, 252, 310, 315, 341, 376].

Summing up Thomas' testimony at the hearings he said that he only pleaded guilty in the Federal Court because his attorney told him that the State would dismiss its charges if he plead guilty to the Federal charges. Although Thomas said various State and Federal agents made such representations to him, those agents known to have dealt with Thomas all denied it [Testimony of Crowe, Mullen, Morneau, Schlatter, Tuggy, Jones, and Sellars]. In essence, Thomas' testimony may be summarized by his own words, at R. T. 170:

" . . . I am going to say anything as long as I am getting what I thought I was gonna get out of it . . . . "

Thomas' attorney, at the time of the plea, testified. At R. T. 61, Bluestein testified that the outcome of the Federal proceeding had no effect on the District Attorney's Office. Bluestein testified, at R. T. 68-69, that any promises made to Thomas in the State court "took place after the plea was entered in this (Federal) case . . . . " Further, Bluestein testified that he never told Thomas that the State charges would be dismissed for a guilty plea to the Federal charge [R. T. 73-74]. Bluestein was certain that any arrangement with the District Attorney was



not "connected in any way upon his plea of guilty in this court. "  
[R. T. 79.]

At the conclusion of Bluestein's testimony he stated his opinion that Thomas would not have plead guilty in the Federal Court without "the deal" he (Bluestein) made with the District Attorney [R. T. 87-88].

It is noted, that even after Thomas was initially sentenced by Judge Stephens he nevertheless, entered a plea of not guilty in the State court which was eventually changed to guilty on January 7, 1965 [Exhibits 3, 8].

As Judge Stephens found, at R. T. 383, Thomas' plea in Federal Court was entered because he wanted the leverage of a long sentence in his plea to the State court for a light sentence, that he committed the bank robbery [R. T. 381], and the plea was free and voluntary [R. T. 381].

### III

#### QUESTION PRESENTED

Whether the District Court abused its discretion in denying the motion to withdraw a plea of guilty made nearly three years earlier and after the defendant knew what was the range of sentence in the Judge's mind.





#### IV

### THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

A motion to withdraw a plea of guilty is directed to the sound discretion of the court. Sherman v. United States, 383 F.2d 837 (9th Cir. 1967); White v. United States, 354 F.2d 22 (9th Cir. 1965); Zaffarano v. United States, 330 F.2d 114 (9th Cir. 1964).

In the instant case the subject motion was made nearly three years after the plea was entered and after the appellant was aware of the range of sentence the judge had in mind. Said factors are significant in the exercise of the court's discretion. White v. United States, supra; Pinedo v. United States, 347 F.2d 142 (9th Cir. 1965); Zaffarano v. United States, supra. It is also noted that the District Court here found that since the original defense was that Thomas felt he could not be identified, the passage of time was particularly significant [R.T. 383-84].

Although defendant recognizes that his testimony at the hearings was of negligible value, the gist of the instant appeal is that William J. Bluestein, "a respected and highly experienced" [App. Op. Br. 5] <sup>3/</sup> attorney gave the opinion that Thomas would not have entered his plea but for the State "deal". Aside from the fact that Judge Stephens gave no weight to such "opinion", it is noted that Bluestein's testimony contradicts the opinion.

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<sup>3/</sup> See, Glickman v. United States, 367 F.2d 562 (9th Cir. 1966) and People v. Darmiento, 243 Cal.App.2d 358 (1966).





The main issue with which the trial court was faced was whether plea was free and voluntary. Aside from the fact that Thomas' allegations in his motion were not supported by believable evidence, the record supports the finding made by Judge Stephens that Thomas "wanted" the 25-year sentence as a lever, while misrepresenting the effect of said sentence to the State Court (Exhibit 3, pp. 3, 9, 10, 13).

Defendant's representation that an uncontradicted "deal" was proven is simply not supported by the record. Even Bluestein's testimony is self-contradictory. (Compare R. T. 61, 69-8, 73-4, 79, 83 with 87-8.)

It is noted that apparently the claim made by Thomas of receiving narcotics from the FBI is abandoned on appeal [App. Op. Br. 4].



## CONCLUSION

Based upon the record and the authorities cited, the trial judge's findings were not only not an abuse of discretion but the only findings possible. The judgment of the District Court should be affirmed.

Respectfully submitted,

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